

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TRAVIS WILLIAMS)	
Claimant)	
VS.)	
)	Docket No. 1,008,174
MAB MASONRY INC.)	
Respondent)	
AND)	
)	
STATE FARM FIRE & CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the November 13, 2003 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits for a permanent partial general disability of 58.75 percent, resulting in a total award not to exceed \$100,000, for injuries suffered through a series of accidents culminating on February 4, 2002. Respondent argues that claimant did not put forth a good faith effort to obtain employment after the injury and a wage should be imputed, resulting in either a functional impairment only or a wage loss of 24 percent. Respondent further argues that claimant's task loss should be zero percent, as claimant has failed to prove what, if any, task loss he suffered from these injuries.

Claimant argues that the Award of the Administrative Law Judge should be affirmed. The Appeals Board (Board) heard oral argument on May 11, 2004.

APPEARANCES

Claimant appeared by his attorney, Kip A. Kubin of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, Denise E. Tomasic of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's injury and disability?
- (2) Is respondent entitled to a credit for an overpayment of temporary total disability compensation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant, a working foreman for respondent's masonry company, was injured through a series of accidents ending on February 4, 2002. Claimant suffered from bilateral hand and arm pain and was referred to Lanny Harris, M.D., for treatment. After conservative treatment, claimant was released to return to work with the restriction that he no longer do bricklaying activities. Respondent was unable to accommodate claimant's restrictions, and claimant was forced into the open labor market to try to obtain a job. After a brief job search, claimant obtained employment with SKO Automotive/Sunflower Dodge in Olathe, Kansas, selling cars, earning approximately \$2,500 per month, which equates to an average weekly wage of \$576.92. This, when compared to claimant's stipulated wage of \$1,120 per week, results in a 48 percent loss of wages.

Claimant applied at several other locations, but was unable to obtain other employment. Claimant also enrolled in full-time school, obtaining both his GED high school equivalency and pursuing continuing education to obtain his structural engineering degree. Claimant testified that he thought he could obtain his degree in four to five years and was willing to work full time while attending full-time school in order to reach that goal.

Claimant was referred by his attorney to Michael J. Poppa, D.O., for an examination on March 28, 2003. Dr. Poppa found claimant to have a 23 percent whole body impairment with specific restrictions. Dr. Poppa was provided a task list which had been created by vocational expert Richard Santner. This task list, comprised of twelve tasks, included eleven that Dr. Poppa felt claimant was unable to perform. However, when the task information was provided to Mr. Santner, he was provided no information regarding claimant's ongoing supervisory responsibilities as a masonry foreman. Claimant, however, did testify at regular hearing to several tasks he performed as a supervisor. When Dr. Poppa was asked about those particular tasks, he testified that claimant was able to

perform the supervisory tasks.¹ The Administrative Law Judge, in considering those additional tasks, found, based upon Dr. Poppa's opinion, that claimant was unable to perform eleven of sixteen tasks, for a 69 percent task loss. The Board finds that opinion to be well supported by the evidence and adopts the 69 percent task loss opinion of the Administrative Law Judge for purposes of this Award.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.²

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.³

K.S.A. 44-510e defines the extent of permanent partial general disability as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

That statute, however, must be read light of both *Foulk*⁴ and *Copeland*.⁵ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In this instance, claimant returned to respondent and attempted to obtain employment as a foreman. However, respondent was unable to accommodate the restrictions placed upon claimant which prohibited claimant from performing work as a bricklayer. Respondent argues that claimant had the ability to perform supervisory duties as a foreman and should have been able to obtain employment at a comparable wage. However, respondent was

¹ Poppa Depo. at 20.

² K.S.A. 44-501 and K.S.A. 44-508(g).

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁴ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

unable to meet those restrictions. It is difficult to accept respondent's argument that claimant should have been able to find those jobs, even though respondent was unable to accommodate those restrictions. The Board finds that the policies of *Foulk* do not apply in this instance, as claimant did not refuse an accommodated job from respondent that would have paid a comparable wage.

In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the *factfinder [sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁶

Here, claimant made several attempts to obtain employment and was successful in obtaining employment as a car salesman in Olathe, Kansas. Claimant's income was estimated at \$2,500 per month, which equates to \$576.92 per week. At the same time, claimant is attending full-time school, seeking his bachelor's degree in structural engineering, which claimant opined would take four to five years. The Board not only refuses to find that claimant has failed to put forth a good faith effort, but commends claimant for being willing to work full time, 50 to 55 hours a week selling cars, while, at the same time, carrying a full college load. The Board cannot find that claimant's actions constitute a lack of good faith and, therefore, rather than imputing a wage, will use the actual wage claimant is earning in computing what wage loss claimant has suffered. As noted above, claimant's wage of \$576.92 equates to a 48 percent wage loss.

In considering both the wage and task loss opinions, the Administrative Law Judge determined claimant's permanent partial general disability, under K.S.A. 44-510e, was 58.75 percent. The Board finds the evidence supports that finding and adopts same as its own.

The Administrative Law Judge found claimant to have a 20 percent functional impairment to the body as a whole. This finding was not argued by the parties, and the Board finds the evidence supports that finding and adopts that finding as its own for the purposes of this award.

Respondent contends that it overpaid claimant temporary total disability compensation. The parties stipulated that claimant was paid 41 weeks temporary total

⁶ Id. at 320.

disability compensation beginning February 28, 2002, and running through December 4, 2002, at the rate of \$417 per week, totaling \$17,097. In Dr. Poppa's report, he discusses a November 5, 2002 report of Dr. Harris, wherein it was indicated that Dr. Harris was going to provide claimant with a permanent impairment and restrict him from working as a brick mason. However, the record does not contain any information from Dr. Harris, as Dr. Harris was not called to testify and none of Dr. Harris's medical records were stipulated into evidence. Respondent argues that the medical evidence from Dr. Poppa's deposition, wherein Dr. Poppa discusses the medical opinions of Dr. Harris, is sufficient to justify terminating the temporary total disability compensation as of November 15, 2002. Therefore, the Board only has the single commentary from Dr. Poppa's report to determine if Dr. Harris provided claimant with a permanent impairment rating and, if so, on what date. The Board finds that respondent has failed to prove that the temporary total disability compensation should have been terminated as of November 15, 2002, and respondent is denied its request for a credit for an alleged overpayment of temporary total disability.

The Board, therefore, finds that the Award of the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated November 13, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kip A. Kubin, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent
Brad E. Avery, Administrative Law Judge

TRAVIS WILLIAMS

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Paula S. Greathouse, Workers Compensation Director